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No. 478

In the Supreme Court of the United States

OCTOBER TERM, 1958

FAREED N. KIAMIE, KIAMIE MANUFACTURING CO., INC., AND KIAMIE FABRICS CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. A1-A17) is reported at 258 F. 2d 924.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1958 (Pet. A1), and a petition for rehearing was denied on September 30, 1958. The petition for a writ of certiorari was filed on October 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

I. In the course of a tax evasion investigation petitioners had furnished Treasury agents two groups of

schedules—the first involving an admission of concealed sales which at the trial were supported in detail by both oral testimony and documentary evidence, and the second involving a self-serving statement as to a similar amount of unrecorded purchases which were not so supported.

The first question is whether the trial court erred in admitting the first group in evidence and ruling that the second group was admissible only as an exculpatory part of the admission, *i. e.*, as showing that, when the schedules of sales were furnished, petitioners claimed that the funds were expended in accordance with the schedules of alleged disbursements.

2. Whether reversible error was committed when, in response to the closing statement of defense counsel that he thought the petitioners were entitled to an acquittal, the prosecutor expressed his conviction that on the facts in the case there was no alternative but a verdict of guilty—where the trial court thereafter instructed the jury that as the sole judges of the facts they should disregard the opinions of counsel as to the verdict which should be reached.

3. Where the Government's proof, in accordance with the indictments and bills of particulars, established an understatement of petitioners' income resulting from the exclusion of unrecorded sales, whether there was a variance between charge and proof merely because petitioners attempted and failed to show that their income had been correctly computed in a manner different from that indicated in their returns.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145—PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b)).

STATEMENT

On July 12, 1951, there were filed against petitioners in the United States District Court for the Southern District of New York two indictments alleging that they had willfully attempted to evade corporate taxes by filing false and fraudulent returns in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 1a, 15a–19a.)[1] The amounts of net income and tax liability thereon, as reported in the re-

[1] References to the appellant's appendix in the Court of Appeals are designated "R". References to the Government's appendix in that court are designated "GA".

turns and as corrected, were alleged to be as follows (R. 16a–19a):

Corporation and year	Net income		Tax liability	
	Reported	Corrected	Reported	Corrected
Kiamie Mfg. Co., Inc.:				
F. Y. ended 1/31/46	$19,725.31	$136,554.15	$5,158.83	$98,142.64
Kiamie Fabrics Co., Inc.:				
F. Y. ended 4/30/45	3,285.92	384,396.85	*821.48	290,848.30
F. Y. ended 4/30/46	5,915.52	167,825.27	1,419.40	109,953.41
F. Y. ended 4/30/47	8,086.06	28,104.35	1,759.79	7,395.29
Totals	37,012.81	716,880.62	9,159.50	506,339.64

After a jury trial lasting almost nine weeks, the petitioners were found guilty as charged on all counts. (R. 1865a.) On May 21, 1956, petitioner Fareed Kiamie was fined $10,000 on each of the four counts and given concurrent four-year prison sentences on each count. The petitioner corporations were fined $10,000 on each count in which they were named, a total fine against the corporations of $40,000. (R. 1901a–1908a.)

The evidence established concealment of vast amounts of corporate sales by a variety of fraudulent devices, including double sets of books, dummy corporations, a secret bank account, and false statements to the authorities. The total of corporate tax, the evasion of which was attempted, was $402,146.74. (R. 735a–738a.) When the investigating agents began to uncover the scheme, Kiamie invented one false explanation after another over the succeeding years, all of which were disproved at the trial.

The Kiamie Manufacturing Company, Inc., which was organized in 1934 by Fareed N. Kiamie, engaged in the manufacture and sale of ladies' lingerie. (Govt. Ex. 9; R. 432a.) Kiamie was its president

and sole stockholder. (R. 432a.) In 1943, Kiamie formed six more corporations: petitioner Kiamie Fabrics Company, Inc., Lerena Lingerie Manufacturing Company, Inc., Princess Raja Manufacturing Company, Inc., Princess Helena Manufacturing Company, Inc., Rosamonde Lingerie Manufacturing Company, Inc. and Kiamie International Ltd., Inc. (Govt. Exs. 10, 12, 13; R. 432a–433a, 759a–760a.) Kiamie owned all the stock and was the president of all the corporations. (R. 432a.) Early in 1944, Kiamie merged Lerena with petitioner Kiamie Manufacturing and merged Princess Raja with petitioner Kiamie Fabrics. (Govt. Exs. 11, 14.) All of these corporations sold the same type of merchandise, shared a common inventory, occupied the same premises, and were served by the same employees. (Deft. Ex. NO; R. 494a–495a, 1195a–1196a, 1245a–1246a.) They filed separate income tax returns, however, rather than consolidated returns. (R. 480a–482a.)

Kiamie personally supervised the employees of the corporations and watched closely the corporations' financial affairs, receiving monthly financial statements of their activities. (R. 431a–433a, 481a, 1127a, 1272a–1273a, 1322a, 1408a.) Annual financial statements of the corporations were first submitted for review by Kiamie. After having certain adjustments made in the figures, Kiamie furnished inventory figures to the accountants, who then prepared a pencil copy of the corporate tax returns. These were submitted to Kiamie for further review and approval before being typewritten in final form. (R. 481a–483a.)

Between June, 1944, and August, 1946, the petitioner corporations made unrecorded and unreported sales totalling in excess of one million dollars. (Govt. Ex. 229; Deft. Ex. NS.) The bulk of these suppressed sales were concealed by double sets of corporate sales invoice books. For example, Kiamie Manufacturing made sales on printed invoices of Lerena Lingerie Manufacturing Company, Inc., the "Inc." being stricken off. Since Lerena Lingerie Manufacturing Company had been incorporated as Lerena Lingerie Manufacturing Co., Inc., in December, 1943, and had merged with Kiamie Manufacturing in February, 1944, Lerena Lingerie Manufacturing Company was not in existence except as a camouflage for unreported sales of Kiamie Manufacturing. (Govt. Exs. 10, 14, 144; R. 433a, 575a-581a.) In the same manner, Kiamie Fabrics made sales on sales invoices of Princess Raja Manufacturing Company, Inc., which were altered by striking off the "Inc." At the time this was done the Princess Raja Manufacturing Company did not exist because it had been incorporated in December, 1943, and had been merged in May, 1944, with Kiamie Fabrics. (Govt. Exs. 11, 13, 45, 233; R. 433a, 564a–575a, 580a-581a.)

Another method of suppressing sales was by the false voiding of sales invoices. Upon receiving checks in payment of sales, Kiamie would instruct his chief bookkeeper, Bernstein, to mark the office copy of the invoice "void" as if the sale had never been made. Invoices so marked were not recorded by the accounts receivable department, and hence were not reported

on the tax returns. (Govt. Ex. 116; R. 195a–198a, 601a–603a, 1127a–1128a.) A third method of concealment lay in the use of false credit memoranda. After checks had been received in payment of merchandise shipped, Kiamie would instruct Bernstein to prepare credit memoranda falsely indicating that the merchandise had been returned, resulting in cancellation of the sale just as if the merchandise had in fact been returned. (Govt. Ex. 190; R. 253a–254a, 603a–607a, 1128a–1129a.)

Kiamie delivered to Bernstein in batches the checks in payment of unrecorded sales with instructions to list them on memoranda. The checks were then turned over to one of two check cashers, or to Lothstein, an attorney on Kiamie's payroll, to be cashed or deposited in a secret bank account which Lothstein had opened for Kiamie at the Manufacturers Trust Company. Checks so deposited were marked with the symbol endorsement of the Chase Discount Company, which Lothstein created for the purpose of negotiating Kiamie's checks, but were not endorsed by Kiamie or the corporations. Kiamie concealed the unrecorded sales and secret bank account from his accountants and from virtually all his employees. (Govt. Exs. 197–198, 216–219, 225–227, 229, 318; R. 303a–310a, 336a–338a, 437a, 440a, 443a, 468a–477a, 781a–783a, 1065a, 1070a–1074a, 1102a–1103a, 1129a, 1194a, 1279a–1280a, 1691a.)

The total understatement of net income by the two petitioner corporations during the prosecution years was $643,131.16, resulting in a tax deficiency of

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$402,146.74. (Govt. Exs. 233, 308–311; R. 599a–601a, 734a–738a.)

These defalcations first began to come to light in 1947, when a Treasury agent discovered that checks paid to some of the Kiamie corporations had been cashed at the Manufacturers Trust Company. He passed this information on to Gellin, Kiamie's accountant, and Gellin agreed to talk to Kiamie. Gellin suggested to Kiamie that the bank's records be audited to determine whether customers' checks had been cashed, and Kiamie falsely stated that he did not "believe he cashed very much. If he did, it was very, very little." (R. 436a.) After two or three days of auditing, Gellin advised Kiamie that he had already found about $25,000 of such cashed checks. Again Kiamie gave a false explanation, replying "It can't be. It must be a mistake." (R. 436a–437a.) Shortly thereafter, all funds were withdrawn from the Chase Discount account and it was closed. (Govt. Exs. 197, 201–202.) Later, in October, 1947, the account came to the attention of the investigating agents. When the agents confronted Kiamie's representatives with the secret account and unrecorded sales, Lothstein immediately called Kiamie to tell him that the Treasury agents "know everything." (R. 437a–440a.) Kiamie then admitted for the first time that he had made unrecorded sales and had opened a secret bank account through Lothstein, but claimed

[2] In fact, Kiamie had caused to be cashed at least $50,000 of customers' checks at the Manufacturers Trust Company. (Govt. Ex. 229.)

that the proceeds had been used to purchase merchandise for the corporations. (R. 440a.)

In July, 1948, Kiamie's representatives submitted to the Internal Revenue Service a schedule of alleged cash payments to vendors (Deft. Ex. MQ) totalling $1,405,157.05, as Kiamie's explanation for the unrecorded sales, together with a detailed schedule of unrecorded sales (Govt. Ex. 229) totalling $1,323,334.42. (R. 452a, 478a–480a, 612a.) The latter schedule was supported by underlying documents. (R. 441a–444a, 468a–476a, 595a–596a.) The schedule of alleged cash payments for purchases, however, was unsupported. (R. 617a, 626a–627a.)

By October, 1950, the internal revenue agents had completed their investigation. (R. 682a, 722a.) Although Kiamie's representatives had been "consulting with the Treasury Department continuously" (R. 524a), they had never contended that the unreported sales had, in fact, been recorded on the books or reported in the tax returns (R. 626a, 645a, 722a). Late in 1950, over three years after the investigation had begun, Kiamie advanced the entirely new defense that the unreported sales had been recorded as intercorporate sales. (R. 722a, 1696a–1697a.) Kiamie claimed that these sales had all been reported as intercorporate sales which he thought could be matched with the unrecorded sales "dollar for dollar and sale for sale." (R. 1695a–1696a.) One of Kiamie's accountants, Solomon, then made an extensive analysis of the intercorporate sales in an attempt to prove the truth of what Kiamie had said. The analysis, however, proved

just the converse: of the thousands of unrecorded sales invoices not one matched an intercorporate sale. (R. 1697a–1698a.) When Solomon told Kiamie what he had found, Kiamie changed his explanation, stating that the intercorporate sales were entered from tape totals of the unrecorded sales. (R. 1697a–1698a.) Solomon made a new analysis and found that Kiamie's new explanation was also false. The total unrecorded sales differed substantially from the total intercorporate sales. (R. 1699a–1700a.)

Kiamie then hired an outside accountant, Batzer, to undertake an analysis of the intercorporate sales on still another basis. While Kiamie had led Solomon to believe that all intercorporate sales reflected unrecorded sales, Batzer included only those intercorporate sales recorded in the sales account of the general ledger, thereby excluding many intercorporate sales. (R. 1698a–1699a, 1700a–1702a.) Batzer, by means of these exclusions and by dropping from his computations the months of April, 1946, through July, 1946, was able to conclude that unrecorded sales and intercorporate sales were within some $23,000 of being in agreement, both totalling approximately $1,400,000. (Deft. Exs. NS, NT.) Batzer admitted, however, that the intercorporate sales commenced before and continued long after the unrecorded sales (R. 1580a–1581a, 1611a–1613a); that not a single unrecorded sale matched an intercorporate sale by date and amount (R. 1579a); that the monthly totals for all of the Kiamie corporations' unrecorded sales never matched the intercorporate sales (Govt. Ex.

327); that the total intercorporate sales of all Kiamie corporations for the entire period of the unrecorded sales (August, 1943, through July, 1946) was over $400,000 greater than the unrecorded sales (Deft. Exs. NS, NT); that in August, 1944, the total intercorporate sales to date exceeded the unrecorded sales by almost $100,000, although Kiamie was contending that the intercorporate sales were entered from tape totals of the unrecorded sales (Govt. Ex. 327; R. 1583a–1586a); and that the total intercorporate sales of none of the corporations matched its unrecorded sales (Deft. Exs. NS, NT).[3]

Nevertheless, Batzer was the principal defense witness at the trial, and the defense was based upon the theory that omission from the returns of the unrecorded sales did not result in a tax due and owing because of the erroneous inclusion of fictitious intercorporate sales in the gross income figures reported. Apparently recognizing that this defense would be unavailing—because each intercorporate sale was, of course, offset by an intercorporate purchase—the petitioners also contended that their gross profits had been computed by applying estimated gross profit percentages to the total sales rather than by the orthodox method of computing and subtracting the cost of goods

[3] The unrecorded sales of Kiamie Fabrics for the period August, 1943, to July, 1946, totalled $611,995.78, as compared with intercorporate sales of only $330,246.58. The unrecorded sales of Kiamie Manufacturing during that period totalled $505,447.45, as compared with intercorporate sales of $831,335.85. These figures include the unrecorded and intercorporate sales of Princess Raja and Lerena, respectively. (Deft. Exs. NS, NT.)

sold from the total sales. (R. 1450a–1475a, 1480a–1560a; GA 24a–37a.) If this could have been proved, the overall effect of inclusion of fictitious intercorporate sales would have been to offset the omission of the unrecorded sales. In contravention of this defense there were, among other things, (1) the fact that the returns themselves showed that gross profit from sales was arrived at by subtracting from gross sales the cost of goods sold computed in the orthodox manner;[4] (2) the belated nature of the contention, which evolved gradually, beginning in the fourth year of the investigation (*supra*, pp. 9–11); (3) the fact that the intercorporate sales were actually a means of allocating costs among the various corporations (R. 691a–692a, 1582a);[5] (4) the fact that the gross profits percentage formula which

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[4] Thus, for example, Schedule A of the return of Kiamie Manufacturing Company, Inc., for the fiscal year ending January 31, 1946, revealed that cost of goods sold was computed as follows (Govt. Ex. 1):

Inventory at beginning of year	$184,371.29
Material or merchandise bought for manufacture or sale	1,453,509.01
Salaries and wages	214,934.87
* * * * *	
Total	$1,852,815.17
Less: Inventory at end of year	217,664.78
Cost of goods sold (enter as item 2, page 1)	$1,635,150.39

See also the testimony of defense witness Batzer. (R. 1591a–1593a.)

[5] Kiamie had ordered all intercorporate sales eliminated from the gross sales in reporting the gross receipts of the corporations to the New York City tax authorities. (Govt. Exs. 330–333; R. 1663a–1668a.)

would result in the gross profit actually reported would have to be expressed in hundred thousandths of a percent (*e. g.*, the gross profit of Kiamie Manufacturing for its prosecution year would be 16.23473% (Govt. Ex. 1)); and (5) the fact that under OPA regulations the corporations were allowed a gross profit ranging between 30% and 40%, compared with a reported profit ranging from 15% to 20% if computed by such a formula (Govt. Exs. 1–4, 340; R. 1713a–1714a).

ARGUMENT

1. There is no merit in the petitioners' first contention, that the trial court erred in not permitting the jury to give full probative effect to defendants' Exhibit MQ, the schedule of alleged black market cash payments to vendors which were unrecorded on the corporations' books and unreported on the tax returns. (Pet. 8–13.) This exhibit was submitted to the Treasury agents by petitioners' representatives in 1948 together with Government's Exhibit 229, a detailed schedule of sales admitted to have been unrecorded and unreported. (*Supra*, p. 9.) Government's Exhibit 229 was prepared under the supervision of Gellin, one of the petitioners' accountants, from supporting documents introduced into evidence by the Government at the trial (R. 441a–444a, 468a–476a, 595a–598a), and was received in evidence on Gellin's testimony (R. 466a) Gellin, however, had nothing to do with the preparation of defendants' Exhibit MQ and he never saw the records which Bernstein, the bookkeeper, claimed to have used in its preparation. (R. 478a,

489a–490a.) Indeed, Exhibit MQ was wholly unsupported by records. Bernstein claimed at the trial that the records (alleged to have been "tally sheets") were missing, although Kiamie was the last person who was supposed to have had them. (R. 1139a–1141a, 1706a–1707a.) Nevertheless, the trial court admitted Exhibit MQ into evidence on the theory that it was a part of the admission embodied in Exhibit 229, since the two groups of documents were submitted at the same time, stapled together. (*Supra*, p. 9; R. 981a–982a.) Since Exhibit MQ was unsupported hearsay, the court admitted it not as proof of the facts asserted but as part of the admission contained in Exhibit 229, *i. e.*, as showing that at the time the papers were submitted Kiamie made the claim that the funds were expended as shown in Exhibit MQ. This ruling was clearly correct. *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, 682 (C. A. 2d), certiorari denied, 323 U. S. 769; VII Wigmore, *Evidence*, Secs. 2100, 2113, 2119. Exhibit MQ would not have been admissible for any purpose except on the theory that it constituted an exculpatory portion of the admission, and certainly the jury should not have been permitted to give full probative force to mere self-serving lists purporting, without proof, to account for the expenditure of some $1,400,000. Moreover, petitioners have not shown that they were prejudiced by the admission of Exhibit MQ solely as an exculpatory statement. The trial court made it very clear that they were free to introduce competent evidence of the alleged expenditures if they so desired. (R. 982a–983a.)

The cases asserted by petitioners to be in conflict with the instant case are easily distinguishable. In

Insurance Co. v. Newton, 89 U. S. 32, the very language of this Court relied upon by petitioners (Pet. 10–11) shows that the crucial matter erroneously excluded from evidence was an integral, inseparable part of the matter admitted into evidence and was proved by the same documents and with equal trustworthiness. In the case at bar we have two groups of schedules, joined only by a staple, one involving an admission as to sales supported in detail by both oral testimony and documentary evidence, and the other involving a self-serving statement as to purchases without such support. In *Perrin* v. *United States,* 169 Fed. 17 (C. A. 9th), unlike the instant case, the self-serving statement was excluded entirely even though it had been expressly incorporated by reference into the admission, and the trial court refused to permit the witness to testify as to the matters contained in the admission. We submit that no conflict is presented and that the trial court was plainly right in admitting defendants' Exhibit MQ only as an exculpatory part of the admission.

2. Equally without merit is the contention (Pet. 13–16) that the prosecutor committed reversible error in the closing sentences of his summation, when he stated (R. 1778a):

> Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring

> back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.
>
> Thank you very much.

As the trial court pointed out (GA 286a), the remarks were invited by defense counsel when he stated at the close of his summation (GA 285a):

> I don't think I need say much more. You know the charge; you have heard the evidence. I think he is entitled to an acquittal, and I don't think you can brand him a criminal on the kind of testimony that has been produced before you.
>
> Thank you very much.

Petitioners are in no position to complain of comments which they themselves invited. Cf. *Lawn* v. *United States*, 355 U. S. 339, 359–360 (fn. 15) and cases cited. It is permissible for the prosecutor to ask the jury for a conviction and to express his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6th), and cases cited. In the instant case, in sharp contrast to the case relied upon by the petitioners (Pet. 15–16, *Berger* v. *United States*, 295 U. S. 78), the prosecutor did not state or imply that he was relying upon evidence known to him but not introduced before the jury, but in the very sentence complained of made it clear that he was relying upon "the facts in this case" (R. 1778a).

It should be noted, moreover, that when defense counsel first raised this objection on the day following

the summations (R. 1779a–1780a) the trial court agreed to comment on the matter in his charge to the jury (R. 1794a–1795a). His instruction on the subject was as follows (R. 1845a):

> As I have told you several times, you are the sole judges of the facts. Counsel's opinions as to what you are going to do or what you ought to do are completely immaterial and should be disregarded by you.

We submit that if there was any impropriety in the prosecutor's statement it was so trivial against the background of a trial lasting almost nine weeks that it was completely cured by the above instruction.

3. Petitioners finally contend (Pet. 16–20) that they were deprived of their constitutional right to be informed of the charges against them because the Government, during the trial, allegedly departed from the theory set forth in the bills of particulars (which listed specific unreported sales) and asserted that the tax evasion was attempted by applying an improper gross profit percentage. This argument is also without substance. The petitioners were informed of the exact nature of the charges against them four years before the trial when the Government filed its bills of particulars listing the names and addresses of the customers involved in the unreported sales, and the total amount sold to each customer during each fiscal year. (R. 24a–27a, 32a–45a.) These were changed in minor respects by amended bills of particulars filed two months before the trial. (R. 47a–51a, 53a–66a.) The Government's case was tried on the theory set forth in the bills of particulars (Pet. 4), and this theory ac-

cepted the cost of goods sold and the method of computing gross profit shown in the petitioners' returns.* See *United States* v. *Bender*, 218 F. 2d 869, 871–872 (C. A. 7th), certiorari denied, 349 U. S. 920; *United States* v. *Stayback*, 212 F. 2d 313, 316–317 (C. A. 3d); *Clark* v. *United States*, 211 F. 2d 100, 103 (C. A. 8th).

One of the elements of the crime thus proved was an additional tax due and owing as a result of petitioners' failure to report the unrecorded sales. Apparently, however, even petitioners ultimately recognized the futility of attempting to attack directly the Government's proof of this element; it was too obvious that the intercorporate sales did not in fact represent the unrecorded sales. Accordingly, petitioners concentrated on attacking indirectly the Government's proof of an additional tax due and owing, this attack taking the form of the defense theory which first injected the issue of a gross profit percentage into the trial. Thus, the defense undertook to show that there was no additional tax due and owing because "the gross profit was a correct figure" (GA 32a), arrived at by applying to sales, including fictitious intercorporate sales which at least equalled the excluded unrecorded sales, a gross profit percentage based on "their experience" (R. 89a). When in this connection questions arose as to the admissibility of certain summary charts offered by the defense, the trial court took the position that the documents would be inadmissible without proof that the gross profits were computed as

* The contention with respect to the sufficiency of this evidence, advanced by petitioners below, has been abandoned here.

a percentage of sales, and that the percentage applied was at least approximately correct. (R. 1458a–1469a.) In this the court was plainly correct, for without evidence that there was actually employed a profits percentage formula, and that such formula had some basis of accuracy, the computations in the schedules offered would be totally irrelevant. The petitioners apparently realized this fact early in the trial, for it was in his opening statement that defense counsel asserted that the alleged gross profit percentage was based upon "their experience." (R. 89a; cf. GA 32a.) Later, however, the defense took the position that the Government presumably had to accept the incredible claim (*supra*, pp. 10–13) that a percentage formula had been actually employed, and had the burden of showing that the percentage allegedly used was incorrect. (R. 1459a.) We submit that the Court of Appeals was clearly right in holding that to require petitioners "to prove an essential element of their defense did not confront them with a new charge or shift the burden of proof" (Pet. A8), and that "It is significant that during the course of the trial no claim of surprise was ever made." (Pet. A7.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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